

## **ADMINISTRATIVE PANEL DECISION**

TMD Swiss AG v. Cambuilder Manager, ICF Technology Inc.  
Case No. D2023-4677

### **1. The Parties**

The Complainant is TMD Swiss AG, Switzerland, represented by Merk-Echt B.V., Netherlands (Kingdom of the).

The Respondent is Cambuilder Manager, ICF Technology Inc., United States of America, represented by Paul Raynor Keating, Esq., Spain.

### **2. The Domain Name and Registrar**

The disputed domain name <lovecam.com> is registered with Sea Wasp, LLC (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on November 10, 2023. On November 13, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 14, 2023, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on November 16, 2023. In accordance with the Rules, paragraph 5, the due date for Response was December 11, 2023. The Response was filed with the Center on December 11, 2023. The Respondent submitted an unsolicited supplemental filing on December 29, 2023.

The Center appointed Petter Rindforth, Gerald M. Levine, and Warwick A. Rothnie as panelists in this matter on January 5, 2024. The Panel finds that it was properly constituted. Each member of the Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

#### **4. Factual Background**

The Complainant is the owner of European Union Trademark No. 005506241, XLOVECAM, in respect of broadcasting, dissemination and transmission of visual images, audio information, graphics, data and other information, using radio, telecommunications apparatus, electronic media or the Internet services in International Class 38. The application to register this trademark was filed on November 28, 2006, and was formally registered on October 17, 2007.

There is also a live adult web cam streaming site at “www.xlovecam.com”. This domain name was registered on January 25, 2006. It is not clear from the Complaint whether this website is in fact operated by Complainant or in some way associated with the Complainant, although the website does indicate that “xlovecam” is a registered trademark. There is also no information before the Panel about when the website began operating or took its present form.

While the disputed domain name was initially registered on September 22, 1998, the Respondent became the registrant on November 23, 2013. The disputed domain name also resolves to a website providing live video feeds of “adult content”. Screenshots included in, in particular, Annex RE20 to the Response appear to show that the Respondent’s service is a continuation of the service being provided from “www.lovecam.com” since at least September 2007 although in 2006 and 2007 prior to September 2007, the website appears to have been a parking page with pay-per-click (“PPC”) advertising links including links to “live web cams” and “super sexy singles” amongst others.

On September 14, 2023,<sup>1</sup> the Complainant’s legal representative sent an email to the Respondent informing it of the Complainant’s registered trademark and demanding transfer to the Complainant of the disputed domain name.

On October 26, 2023, the Respondent’s legal representative replied with a detailed rebuttal of the Complainant’s demands.

On December 21, 2023 (after the filing of the Response), the Complainant filed European Union Trademark Application No 018966982, LOVECAM, in respect of a range of telecommunications, broadcasting and related services in International Class 38. That application is still pending.

#### **5. Discussion and Findings**

##### **5.1 Preliminary Issue: Respondent’s supplemental filing**

In this proceeding, the Respondent has unilaterally submitted an unsolicited supplemental filing notifying the Panel of the Complainant’s EUTM application No. 018966982, LOVECAM.

Apart from documents requested by the Panel pursuant to paragraph 12 of the Rules, neither the Policy nor the Rules expressly provide for supplemental filings. Their admissibility is therefore in the discretion of the Panel bearing in mind the requirements under paragraph 10 of the Rules to ensure that the proceeding is conducted with due expedition and both parties are treated equally, with each party being given a fair opportunity to present its case.

The present case is somewhat unusual in that it is the Respondent seeking permission to file a supplemental filing rather than the Complainant purporting to deal with something arising from the Response. Nonetheless, the Panel considers it appropriate to admit the supplemental filing in this case because the filing of the Complainant’s trademark application took place after the Response was filed and could not have been addressed then.

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<sup>1</sup> In the Response and Respondent’s representative’s letter dated October 26, 2023, the date of the approach by the Complainant’s legal representative is given as August 28, but the reprinted email in Annex RE24 is September 14, 2023.

## 5.2 Case Merits

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of the disputed domain name, the Complainant must demonstrate each of the following:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) the disputed domain name has been registered and is being used in bad faith.

Paragraph 15(a) of the Rules directs the Panel to decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.

### A. Identical or Confusingly Similar

The first element that the Complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the Complainant's trademark rights.

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the disputed domain name. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ("[WIPO Overview 3.0](#)"), section 1.7.

There are two parts to this inquiry: the Complainant must demonstrate that it has rights in a trademark at the date the Complaint was filed and, if so, the disputed domain name must be shown to be identical or confusingly similar to the trademark.

The Complainant has proven ownership of the registered EUTM for XLOVECAM. The pending application, EUTM No 018966982 for LOVECAM, does not qualify as trademark rights under the Policy, however, and the Complainant has made no attempt to prove it has acquired rights in that expression as an unregistered trademark. Respectively, [WIPO Overview 3.0](#), section 1.1.4 and section 1.3.

The second stage of this inquiry simply requires a visual and aural comparison of the disputed domain name to the proven trademarks. This test is narrower than and thus different to the question of "likelihood of confusion" under trademark law. Therefore, questions such as the scope of the trademark rights, the geographical location of the respective parties, the date they were acquired and other considerations that may be relevant to an assessment of infringement under trademark law are not relevant at this stage. Such matters, if relevant, may fall for consideration under the other elements of the Policy. See e.g., [WIPO Overview 3.0](#), section 1.7.

In undertaking that comparison, it is permissible in the present circumstances to disregard the generic Top-Level Domain ("gTLD") component as a functional aspect of the domain name system. [WIPO Overview 3.0](#), section 1.11.

Disregarding the ".com" gTLD, the disputed domain name consists of the Complainant's registered trademark but omitting the initial letter "x".

On one view, this difference could still qualify as confusingly similar. See for example [WIPO Overview 3.0](#), section 1.9. In the present case, that analysis is complicated by the fact that the expression "love cam" or "lovecam" is a commonly used expression to describe the particular forms of activity of the kind being streamed from the websites referred to above.

The Respondent points out that the disputed domain name consists of two ordinary English words – “love” and “cam”. That is not determinative of itself as two ordinary words could be combined to create a distinctive expression. The Response, however, includes numerous examples of the combined expression being used to describe live video chat or webcam services of the kind being streamed from the websites referred to above. The omission from the disputed domain name of a key component which contributes to the overall distinctiveness of the Complainant’s trademark, therefore, complicates the analysis.

It is clear, however, that the Complainant does have a registered trademark which is entitled to protection. It is also clear that the Respondent is providing a service using a closely similar sign of the kind falling within the scope of the Complainant’s rights and in competition with the service using the Complainant’s trademark.

In these circumstances, the Panel finds that while the assessment here is not straightforward the Complainant has satisfied the standing requirement under the Policy and the Complainant has established the first requirement under the Policy. In either event, given the findings below, it is not strictly necessary to come to a determination on this matter, nor does a finding in the Complainant’s favour under the first element result in an overall finding in its favour in the case.

## **B. Rights or Legitimate Interests**

Paragraph 4(c) of the Policy provides a list of circumstances in which the Respondent may demonstrate rights or legitimate interests in a disputed domain name.

Although the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the difficult task of “proving a negative”, requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name (although the burden of proof always remains on the complainant). If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1.

In the present case, the Complainant states that it has not given the Respondent permission to use the disputed domain name and, as the disputed domain name is “highly similar” to the Complainant’s trademark, the Respondent has no rights or legitimate interests in the disputed domain name.

It is also true that the Respondent became the registrant of the disputed domain name several years after the Complainant’s trademark was registered.

The Respondent states that it was unaware of the Complainant’s trademark and business when it became the registrant of the disputed domain name and was just continuing to use the disputed domain name in accordance with its descriptive meaning and in the way it had been used for many years beforehand. The Respondent also provides evidence that it has registered numerous other domain names of similar character including, for example, these include <sexcam.com>, <findmelovecams.com>, <lovetreecams.co>, and many others.

The Complainant has not provided evidence that the use and promotion of its service or trademark was so extensive or exclusive that the Respondent’s denial of knowledge can be disregarded especially having regard to the descriptive nature of the term “love cam”.

On the record in this proceeding, the Panel finds that the Respondent appears genuinely to be using the disputed domain name in connection with its descriptive meaning and has been doing so for many years. The Respondent claims to have been continuing the descriptive use of the disputed domain name for a number of years before it became the registrant. Under the Policy, use by a prior registrant has not been

automatically imputed to a later registrant. If and to the extent the Respondent was merely continuing a prior existing use, however, could be supportive of the Respondent's claim.

In the circumstances outlined above, therefore, the Panel finds that the Complainant has failed to establish that the Respondent does not have rights or legitimate interests in the disputed domain name. See for example [WIPO Overview 3.0](#), section 2.10.1.

Based on the available record, the Panel finds the second element of the Policy has not been established.

### **C. Registered and Used in Bad Faith**

As the Complainant has failed to establish the second requirement under the Policy, the Complaint must fail and so it is unnecessary to consider the third requirement under the Policy in detail.

The reasons for the Panel's finding that the Complainant has not established the second requirement under the Policy, however, lead to findings that the disputed domain name has not been registered or used in bad faith.

### **D. Reverse Domain Name Hijacking**

The Respondent requests that the Panel consider whether a finding of reverse domain name hijacking is appropriate in this case.

Paragraph 15(e) of the Policy provides that, if after considering the submissions, the Panel finds that the Complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or to harass the domain-name holder, the Panel shall declare in its decision that the Complaint was brought in bad faith and constitutes an abuse of the administrative proceeding. The mere lack of success of the complaint is not, on its own, sufficient to constitute reverse domain name hijacking. [WIPO Overview 3.0](#), section 4.16.

Reasons articulated by panels for finding RDNH include: (i) facts that demonstrate that the complainant knew or ought to have known that it could not succeed as to any of the required three elements, (ii) unreasonably ignoring established Policy precedent notably as captured in the [WIPO Overview 3.0](#), (iii) the provision of false or intentionally incomplete evidence, or otherwise attempting to mislead the panel, (iv) the complainant's failure to disclose that a case is a UDRP refile, (v) filing the complaint after an unsuccessful attempt to acquire the disputed domain name from the respondent without a plausible legal basis, and (vi) basing a complaint on only the barest of allegations without any supporting evidence. [WIPO Overview 3.0](#), section 4.16.

As the Respondent points out, the Complaint consists of the barest of allegations consisting essentially of three substantive paragraphs, the Whois record of the disputed domain name, evidence of the Complainant's EUTM, the Policy, and a print-out of Fabulous.com's terms of service.

Further, the Complaint makes no attempt to address the descriptive nature of the term "love cam" and the use of that expression by the Respondent in connection with the subject matter it describes. These are matters which have been clearly established under the Policy as needing to be addressed. See [WIPO Overview 3.0](#), section 2.10.1. Further still, the Complainant was also put on clear notice of these issues before the Complaint was filed through the Respondent's legal representative's letter in October 2023.

In the present case, the Respondent's longstanding registration has been put at risk and the Respondent has been put to considerable trouble and, presumably, expense to defend that registration by the filing of a most basic Complaint. Taking that into account and having regard to the salient issues addressed in the preceding paragraph and the extremely perfunctory nature of the Complaint notwithstanding notice of these

issues, the Panel considers it appropriate to make a finding of reverse domain name hijacking against the Complainant in this proceeding.

## 6. Decision

For the foregoing reasons, the Complaint is denied. Moreover, the Panel finds that the Complaint has been brought in bad faith and constitutes an attempt at Reverse Domain Name Hijacking.

*/Warwick A. Rothnie/*

**Warwick A. Rothnie**

Presiding Panelist

*/Petter Rindforth/*

**Petter Rindforth**

Panelist

*/Gerald M. Levine/*

**Gerald M. Levine**

Panelist

Date: January 10, 2024